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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

No. 116

LEO H. BOHLING,

Appellant,

vs.

EDWARD CORSI, COMMISSIONER, AND/OR DIVISION OF EMPLOYMENT OF THE DEPARTMENT OF LABOR OF THE STATE OF NEW YORK,

---

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

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EDWARD CORSI, COMMISSIONER, AND/OR DIVISION OF EMPLOYMENT OF THE DEPARTMENT OF LABOR OF THE STATE OF NEW YORK,

Appellees

STATEMENT IN OPPOSITION TO APPELLANT'S STATEMENT OF JURISDICTION AND MOTION TO DISMISS OR AFFIRM

The appellees in the above entitled cause for their joint statement in opposition to appellant's statement as to jurisdiction herein, and in support of appellees' motion to dismiss or affirm, respectfully show the following:

I. Statement of Issues on Appeal

The question sought to be presented in this appeal, as set forth in the petition to this Court for appeal, is whether "the Court of Appeals of New York erred in finding Section 562, Subdivision 1, of the Labor Law of New York State constitutional, insofar as it provides a compulsory tax of

2.7% of pay roll of employer for one full calendar year after the last year wherein said employer employed four or more employees for fifteen days or more."

The statute here under attack is § 562, subd. 1, of the New York Unemployment Insurance Law, being § 562, subd. 1, of Article 18 of the Labor Law of New York (McKinney's Consolidated Laws of New York, Vol. 30), and reads as follows:

> "§ 562. Termination of coverage:
>
> "1. Required coverage. Any employer who has once become liable for contributions under this article shall cease to be liable under the following conditions:
>
> "a. If he files a written application with the commissioner during the fourth calendar quarter, he may be released from coverage as of the first day of the next calendar quarter provided the commissioner finds that the employer has not employed four or more persons in employment within each of fifteen or more days in the completed calendar year in which the application is filed.
>
> "b. If he files a written application with the commissioner in any other calendar quarter of the year he may be released from coverage as of the first day of the calendar quarter following the filing of the application provided the commissioner finds the employer has, before such day, in neither the calendar year in which the application is filed nor in the preceding calendar year, employed four or more persons in employment within each of fifteen or more days."

The case originated in the Supreme Court of the State of New York by the service of a summons and complaint upon the defendants-appellees, in which it was set forth that the plaintiff-appellant, from April, 1947 to January, 1951, employed four employees, and that some time in the first quarter of 1951 said plaintiff ceased to employ four employees, and since that time has at all times employed less than four

employees, and that the Industrial Commissioner has assessed an unemployment insurance tax against the plaintiff "for one full year or more after the date he ceased to employ four persons." The plaintiff-appellant had not filed an application to cease to be subject to the law at the time of the commencement of the suit. The complaint demanded judgment declaring § 562, subd. 1, of the Labor Law of New York to be unconstitutional upon the ground that it sets up an arbitrary and unreasonable classification for the tax, in that it compels employers of three or less to pay the tax if they employed four persons in a previous year, and exempts from such taxation those employers of three persons who have not employed more than three persons in the prior year or years. The complaint further alleges that the statute denies an equal rate of taxation under such circumstances.

The defendants-appellees filed an answer admitting the facts set forth in the plaintiff's complaint and denying the legal conclusions therein, and asked for judgment declaring said statute to be constitutional.

The plaintiff and defendants moved for judgment on the pleadings, and on August 12, 1953, Mr. Justice Ringrose of the Supreme Court of the State of New York, handed down his opinion upholding the constitutionality of said statute, and granting the motion of the defendants for judgment, and denying the motion of the plaintiff. The opinion of the court is reported at 204 Miscellaneous Reports of New York, page 778. Judgment upholding the constitutionality of the statute was entered in the office of the Clerk of the County of Oneida, New York, on August 26, 1953.

Appellant appealed directly from said judgment to the Court of Appeals of New York, which handed down its decision on March 4, 1954, unanimously affirming the judgment appealed from without opinion. The decision of the Court of Appeals is reported at 306 N. Y. 815. Judgment on

the remittitur of the Court of Appeals was entered in the office of the Clerk of the County of Oneida, New York, on March 22, 1954.

The Supreme Court of New York and the New York Court of Appeals held that the statute under attack provides a reasonable and rational basis of classification of employers subject to the unemployment insurance tax where an employer ceases to employ four or more persons; that it is not discriminatory on its face and applies to all employers in a designated class. The court further found that the requirement that a written application must be made before an employer once subject to the Law is released from liability upon a finding that he has not employed four or more persons during the calendar year preceding the application is a reasonable one and conducive to the efficient administration of the law.

II. No Substantial Federal Question Is Presented by the Attempted Appeal

An employer becomes subject to the payment of the tax imposed by the New York Unemployment Insurance Law if he employs in all his several places of employment in the State four or more persons in employment on fifteen or more days in any calendar year, and such liability commences on the first of such fifteen days of employment (New York Labor Law § 560, subd. 1). Under § 562, subd. 1 of that statute, such an employer remains subject to the payment of the tax until he files a written application to be relieved of liability, and such application must be approved by the Industrial Commissioner of the State. If the employer files such a written application during the fourth calendar quarter of any year, he may be released from liability as of the first day of the next calendar quarter if the Commissioner finds that he has not employed four or more persons in employment within each of fifteen or more days in

the completed calendar year in which the application is filed. If the application is filed in any other calendar quarter of the year, the employer may be released as of the first day of the calendar quarter following the filing of the application if the Commissioner finds he has in neither the calendar year in which the application is filed nor in the preceding calendar year employed four or more persons in employment within each of fifteen or more days.

It appears to be appellant's contention that the statute is unconstitutional in that it discriminates by requiring employers who have reached the taxable condition by the employment of four or more persons within each of fifteen or more days in one calendar year to continue to pay the tax based upon the wages of their employees in the year following that event, even though during that year he did not employ four persons, whereas another employer who has not employed four or more persons in the preceding calendar year is not required to pay the tax during the following calendar year. This argument overlooks the fact that in one case the employer has reached the taxable stage, while in the other case the employer has never reached that stage. These unmployment insurance taxes are excise taxes imposed for the privilege of exercising the right to have persons in one's employ (*Carmichael* v. *Southern Coal & Coke Co.*, 301 U. S. 495; *Standard Dredging Corp.* v. *Murphy*, 319 U. S. 306).

The reason for the enactment of the statute under attack is apparent. It prevents a situation where an employee might be employed in covered employment for a short period of time and then engaged in non-covered employment with resulting ineligibility for benefits in case he became unemployed. This carryover provision insures that employees who once become employed in covered employment will remain in that status for the remainder of the calendar year, in which the event causing the liability of the employer for

the payment of these excise taxes occurred, and at least for the following calendar year. It insures continuity of the status of both employer and employee until such time as the employer files application to be released from liability by showing that he has not employed four or more persons for the required period of time.

The statutory provision under consideration is not unique. Provisions not substantially different are to be found in the unemployment insurance statutes of forty-one other states as follows:

Alabama Unemployment Compensation Law § 224;
Arizona Employment Security Act § 56-1008;
Arkansas Employment Security Act § 81-1111 (b);
Colorado Employment Security Act § 8;
Connecticut Unemployment Compensation Law § 7496;
Delaware Unemployment Compensation Law § 3342;
Florida Unemployment Compensation Law § 443.09;
Georgia Employment Security Law § 8;
Idaho Employment Security Law § 52;
Illinois Unemployment Compensation Act § 301;
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Kentucky Unemployment Insurance Law § 341.250;
Louisiana Employment Security Law § 1572;
Maine Employment Security Law § 18 II;
Massachusetts Employment Security Law § 11;
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New Hampshire Unemployment Compensation Law § 7(b);

New Jersey Unemployment Compensation Law §43:21-8(b);
New Mexico Unemployment Compensation Law § 57-808(b);
North Carolina Employment Security Law § 96-11;
North Dakota Unemployment Compensation Law § 52-0504;
Oklahoma Employment Security Act § 218(b);
Oregon Unemployment Compensation Law § 126-702(e);
Rhode Island Employment Security Act § 3(5)(e);
South Carolina Unemployment Compensation Law § 68-253;
South Dakota Employment Security Law § 17.0823(2);
Tennessee Employment Security Law § 6901.8B;
Texas Unemployment Compensation Act § 8(c);
Utah Employment Security Act § 42-2a8(b);
Vermont Unemployment Compensation Law § 5365;
Virginia Unemployment Compensation Act § 60-83;
West Virginia Unemployment Compensation Law Art. V, § 2;
Wisconsin Unemployment Reserves & Compensation Act § 108.02(4)(g); and Wyoming Employment Security Law § 54-108(B).

The courts of several States have held these statutory provisions to be constitutional—

State v. *Sosna*, 156 Kan. 722;
Maine Unemployment Compensation Commission v. *Androscoggin Junior, Inc.*, 137 Me. 154;
Murphy v. *Hurlbut Undertaking & Embalming Co.*, 346 Mo. 405;
Shelton Hotel Co., Inc. v. *Bates*, 4 Wash. (2d) 498; and
Webb v. *State*, Tex. Civ. App., 156 S. W. 2d 557 (not officially reported).

The State of New York, in its exercise of the power to tax, is free to select the subject of taxation and to grant exemptions. The "equal protection" clause of the constitution does not impose upon the State any rigid rule of equality of taxation, and this Court has often held that inequalities resulting from singling out any particular class for taxation or exemption does not infringe on any constitutional limitation (*Carmichael* v. *Southern Coal & Coke Co.*, 301 U. S. 495, at 509; *New York Rapid Transit Corp.* v. *City of New York*, 303 U. S. 573).

The appellant here has failed to carry the burden of showing that the statute does not rest upon any reasonable basis, and that it is essentially arbitrary (*Lindsey* v. *Natural Carbonic Gas Co.*, 220 U. S. 59, at p. 79). Administrative convenience also justifies the statutory provision (*Carmichael* v. *Southern Coal & Coke Co., supra*, at p. 511).

We respectfully submit that there is no substantial question presented by this appeal entitling appellant to invoke the jurisdiction of the Supreme Court of the United States.

WHEREFORE, appellees respectfully move that the within appeal be dismissed or that the judgment of the Court of Appeals of the State of New York be affirmed.

Dated: Albany, New York, May 10, 1954.

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